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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 166

MAY RYAN, Executrix of the Will and Estate of Thomas Ryan, Deceased,
Petitioner,

VERSUS

ACHE C. ALEXANDER, Formerly Collector of Internal Revenue,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Proposition One: The taxpayer was not estopped to claim a refund of tax overpaid for 1924 as the result of the erroneous inclusion in income on his return for that year of certain items of income which belonged in the year 1925 on the ground that the assessment of additional tax upon such items for 1925 was barred by limitation when he filed his claim for refund 31

Proposition Two: The taxpayer was entitled to have his allowance for depletion on the oil production and bonuses for leases received from his land in 1924 computed on the discovery value thereof resulting from the Hully Sands offset well, part of the cost of which he paid for the purpose of dis-

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covering oil on his land and by which he did discover oil on it 39

Proposition Three: The assessment and collection in 1925 of a deficiency in the taxpayer's tax for 1924 was illegal and void in its entirety because made while his appeal from the determination of such deficiency was pending before the Board of Tax Appeals, or, if his appeal to the Board was void, then because made after the assessment and collection of such deficiency was barred by limitation 50

Proposition Four: If by depositing $36,500 with the collector to be held in a special fund without assessment the taxpayer waived the statutory restrictions on assessment of that sum while his appeal was pending before the Board of Tax Appeals, still the assessment of the additional sum of $9,135.73 and the collection thereof by distraint was an illegal and void assessment and collection, because made while his appeal was pending before the Board, or, in event that appeal was a nullity, then because made after the assessment and collection thereof was barred by limitation 55

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF MATTER INVOLVED

This case was begun in the District Court of the United States for the Western District of Oklahoma by Thomas Ryan as plaintiff, but thereafter he died and his executrix, the petitioner here, was duly substituted as plaintiff for him. For convenience he will be referred to herein by name or as plaintiff or as the taxpayer. All italics are ours unless

otherwise indicated. Plaintiff sought to recover income taxes alleged to have been erroneously and illegally collected and paid for the year 1924.

The Pleadings

The petition as amended alleges grounds of jurisdiction and the office of the defendant as a former collector of internal revenue; that the taxpayer in apt time filed his income tax return for the calendar year 1924 and paid the amount of tax shown to be due thereon in the sum of $25,731.12; that thereafter the Commissioner determined a deficiency in his income tax for that year of $36,500 and on November 23, 1929, assessed that amount of tax and the further amount of $9,135.73 of interest thereon, making a total of $45,635.73 of tax and interest so assessed, and the plaintiff paid this amount to the defendant as collector; that this sum was erroneously, wrongfully and illegally assessed, collected and received by him and thereafter in apt time the plaintiff filed with the Commissioner a claim for refund of it based on the same grounds as those set forth in his petition for a recovery, and thereafter filed an amended claim and a second amended claim upon the same grounds, but amplified and supported by argument and authorities; that thereafter the Commissioner allowed the claim for refund in the sum of $6,065.27 of tax and $1,518.10 of interest as admittedly overassessed and overpaid, but rejected it for the balance of the amount claimed; and that the assessment and collection of the alleged deficiency in tax and interest was erroneous, wrongful and illegal for the following reasons:

(1) The taxpayer's books and accounts were kept and his returns for 1924 and all other years were made on a cash receipts and disbursements basis and income in the sum of $40,000 on account of an in-oil payment was erroneously included on his return for 1924 when in fact he received only $8,391.69 of said sum in that year and did not receive the remainder thereof, $31,608.31 in amount, until in 1925, and also other income in the sum of $22,565.33 [the proof showed this to be $16,119.22] on account of oil produced and run from his property in December, 1924, was erroneously included on his return for that year when in fact he did not receive that sum until in 1925.

(2) The Commissioner refused to allow him the deduction from gross income of a reasonable allowance for depletion, based on the correct discovery value of his land for oil, upon bonuses received by him for oil and gas leases and royalties.

(3) The taxpayer, upon receiving the Commissioner's notice of the determination of a deficiency filed an appeal therefrom to the Board of Tax Appeals, and while such appeal was pending and undetermined, the Commissioner assessed and collected from the taxpayer said entire sum of $36,500 tax and $9,135.76 interest, contrary to the provisions of the statute which prohibited him from making any assessment of a deficiency while an appeal from the determination of such deficiency was pending before the Board, or if the appeal to the Board was void, then after the assessment of any deficiency was barred by limitation, and, therefore, said assessment was illegal and void in its

entirety and the collection thereof was illegal and void (R. 9-13, 17, 165, 176).

In his answer the defendant admits the jurisdictional matter and his official position as former collector of internal revenue, the payment to him as collector of the stated amount of deficiency in tax and interest, the filing of the claims for refund on the grounds stated, the allowance of a partial refund of the amount claimed and the rejection of the claim as to the remainder, but denies that the amount of tax and interest not refunded was erroneously or illegally assessed, collected and paid.

For further defense the defendant avers that the plaintiff included in income on his return for the year 1924 the sums of $31,608.31 and $22,565.35 which he now alleges were not received until the succeeding year; that the Commissioner relied on the statements made in plaintiff's return in computing and assessing his tax for 1924; that plaintiff did not assert that the items so received in 1925 were not properly income to him in 1924 until the time limited by statute for the assessment of additional taxes for 1925 had run; and that by reason thereof he is now estopped to assert that any of the items of income so shown on his return for 1924 were not in fact received in that year (R. 13-15, 18).

To defendant's answer plaintiff replied by general denial of all new matter (R. 15-16).

From the pleadings it appears that the issues are:

(1) Whether the plaintiff was estopped to show the

fact, and to recover a refund based on the fact, if shown, that items included in income on his return for 1924 were not in fact received by him until the succeeding year.

(2) Whether his allowance for depletion should be computed on a discovery value of his land for oil prior to the sale of leases thereon and depletion allowed on bonuses received for leases as advanced royalties.

(3) Whether the assessment by the Commissioner and collection by the defendant of an alleged deficiency in tax and interest against him while his appeal from the Commissioner's determination of such proposed deficiency was pending before the Board of Tax Appeals, or if his appeal to the Board was void, then after the assessment of any deficiency was barred by limitation, was an illegal and void assessment and collection of such tax and interest.

The Facts

The facts as established by the pleadings and evidence are as follows:

Thomas Ryan in 1924 and for many years before lived at Wetumka, Oklahoma. He acquired title from various sources many years prior to 1924 to the North Half and the Northwest Quarter of the Southeast Quarter of Section Two, in Township Nine North, Range Nine East, in Hughes County, Oklahoma. The portions of this tract acquired prior to March 1, 1913, had no oil or mineral value when acquired or at March 1, 1913, and the portions acquired after March 1, 1913, had no oil or mineral value when acquired.

Therefore, he had no cost in the oil or mineral value in that land (R. 62).

Prior to 1923 he had executed an oil and gas lease covering the West Half and the Southeast Quarter of the Northwest Quarter of said Section Two which lease was owned throughout 1923 and 1924 by Wittmer Property Trustees, a business trust having its home office at Pittsburgh, Pennsylvania. On December 17, 1923, he executed an oil and gas lease on the Northeast Quarter of the Northwest Quarter of said Section Two to O. F. Cashdollar (R. 188-192). This lease was executed both by lessor and lessee and contained the following provision:

> "This contract to be null and void unless a well is drilled to a depth of 3500 feet on SW¼ of SE¼ of section 35-10-9 Okfuskee County, Okla., unless oil is found in paying quantities at a lesser depth, said well to be completed by Nov. 15th, 1924, this lease (original) to be delivered when well is drilled to a depth of 3000' unless oil is found before" (R. 192).

The court judicially knows that SW¼ of SE¼ of Section 35-10-9 adjoins N½ of Section 2-9-9 on the north. The sole consideration to Ryan for the above lease was the drilling of the well as stipulated which would offset his land (R. 23).

By agreement between the lessor and the lessee the lease when executed was placed in escrow in the American National Bank of Wetumka, Oklahoma, under the provisions of a written escrow statement, signed by the cashier of that bank, that it was to be delivered to the lessee when an oil well was drilled to a depth of 3,000 feet on the

Southwest Quarter of the Southeast Quarter of Section Thirty-five Township Ten North, Range Nine East in Okfuskee County, Oklahoma, unless oil was found in paying quantities at a lesser depth (R. 24, 27). O. F. Cashdollar, lessee named in the lease, was the agent and representative of Wittmer Property Trustees in obtaining and handling leases for that trust in Oklahoma, and in entering into the above lease contract as lessee he was acting for and on behalf of and for the benefit of Wittmer Property Trustees (R. 24, 32). On March 29, 1924, Wittmer Property Trustees, then owning an oil and gas lease on the Northeast Quarter and the South Half of the Southeast Quarter of said Section Thirty-five, as well as on the West Half of the Northwest Quarter and the Southeast Quarter of the Northwest Quarter of said Section Two, and being the beneficial owner of the said lease from Ryan to Cashdollar then in escrow in the said American National Bank, entered into a contract with T. B. Slick whereby he agreed to drill a well in the Southwest Quarter of the Southeast Quarter of said Section Thirty-five, to and through the Papoose Sand found at approximately 3,500 feet, unless oil was found in paying quantities at a lesser depth, and to commence said well not later than April 16, 1924, and to complete it by September 1, 1924, and in consideration therefor was to receive an undivided half interest in the leases owned by Wittmer Property Trustees on the Northeast Quarter and the South Half of the Southeast Quarter of said Section Thirty-five and the West half of the Northwest Quarter and the Southeast Quarter of the Northwest Quarter of the said Section Two (R. 25, 32, 28-30).

Slick commenced the drilling of the well within the time specified and completed it on August 16, 1924, for a producer having an initial production of 1,200 barrels per day (R. 193-194), which within a few days increased to as much as 3,000 barrels per day natural (R. 83, 87).

While the drilling of this well was in progress, and on June 28, 1924, the lease from Ryan to Cashdollar was by agreement delivered by the said American National Bank to the lessee (R. 26, 27).

The South Half of said Section Thirty-five was known as the Hully Sands allotment and the above-mentioned well was known as the Hully Sands #1 (R. 25, 33). Its location was 320 feet north of the south line and 320 east of the west line of the South Half of the Southeast Quarter of said Section Thirty-five (R. 194). This section adjoined said Section Two on the north and so the well was a direct offset to the Ryan land, and in its production of oil it would have the effect to drain oil from the Ryan land (R. 138).

The bringing in of that well had the effect to prove the Ryan land valuable for oil and gas production and to make it what among oil operators and in the oil producing business is termed a "proven area," and to render its fair market value materially disproportionate to its cost (R. 84, 88, 130-131, 138).

If Ryan had not given the lease on NE¼ of NW¼ of Section 2-9-9 through Cashdollar to Wittmer Property Trustees in consideration of the drilling of the Hully Sands

well, that well would not have been drilled at that time nor as an offset to Ryan's land (R. 26-27, 33).

Under date of March 29, 1924, Wittmer Property Trustees executed three assignments of oil and gas leases to Slick; one was of an undivided half interest in a lease on W½ of NW¼ and SE¼ of NW¼, Section 2-9-9; another was of an undivided half interest in a lease on NE¼, Section 35-10-9 (R. 40-42), and the other was of an undivided half interest in a lease on S½ of SE¼, Section 35-10-9 (R. 43-44).

These were all recorded on June 10, 1924. Under date of August 5, 1924, Wittmer Property Trustees through Cashdollar assigned to Slick an undivided half interest in the oil and gas lease given by Ryan on NE¼ of NW¼, Section 2-9-9, and the assignment was recorded August 13, 1924 (R. 34-35). These assignments fulfilled the contract of Wittmer Property Trustees with Slick.

Within thirty days after the Hully Sands well was brought in the Northeast Quarter of said Section Two had an oil and gas lease bonus value of $1,250 per acre and a value for the ⅛th royalty reserved to the lessor of $1,250 per acre, and the Northwest Quarter of the Southeast Quarter of said Section Two had an oil and gas lease bonus value of $625 an acre and an oil royalty value of $625 an acre (R. 84, 88).

On August 13, 1924, two days after the Hully Sands well came in, Ryan sold an oil and gas lease on the West Half of the Northeast Quarter of said Section Two to the Independent Oil & Gas Company for a bonus of $80,000.

This lease, in the usual form of oil and gas leases in the Mid-Continent field, provided for the payment of 1/8th royalty to the lessor and carried a 7/8ths working interest to the lessee (R. 85, 99, 131, 152, 194-199).

On September 18, 1924, 33 days after the Hully Sands well was brought in, Ryan sold a similar lease on the East Half of the Northeast Quarter of said Section Two to the Independent Oil & Gas Company for a bonus of $100,000, of which $60,000 was paid in cash and notes equivalent to cash, and $40,000 was to be paid out of 1/2 of the first oil produced from the leased premises (R. 85, 99-100, 152, 130, 199-205).

On September 24, 1924, 39 days after the Hully Sands well was brought in, Ryan sold a similar oil and gas lease on the Northwest Quarter of the Southeast Quarter of said Section Two to Skelly Oil Company for a cash bonus of $20,000 (R. 100, 131, 152, 206-208).

For services in the selling of these leases Ryan paid a broker's commission of 5%, or $10,000, on the gross bonus price of $200,000 (R. 118).

Immediately upon the execution of these leases the drilling of wells on the leased premises was commenced and at the end of 1924 five producing wells had been brought in on Ryan's land and others were drilling (R. 213).

On March 16, 1925, March 15 being Sunday, Ryan filed with the defendant, then Collector of Internal Revenue for the District of Oklahoma, his income tax return for

the year 1924 on which he reported oil and gas royalties received in the sum of $43,254.33, and reported the $190,000 net bonuses received from the sale of oil and gas leases (inadvertently including the full amount of the $40,000 in-oil payment as actually received) as gain on the sale of capital assets held more than two years. He also reported interest received and net income from business totalling somewhat less than $10,000, but none of this is involved here. His tax liability as computed on his return was $25,731.12, which he paid in due course (R. 182, 147-149).

In 1923 he employed Tom F. Carey, a certified public accountant, to prepare his income tax return for the year 1922. This employment was continued for all years to and including 1937, except that Carey did not prepare his return for 1923 (R. 63, 119). Carey represented Ryan before the Treasury Department in respect of his income tax liability for 1924 at all times herein mentioned. Ryan's business was primarily farming and dealing in land (R. 64) and he did not keep any complete books of account or records of his business, and the most complete record he had was his bank account. Such accounts and records as he had were kept on a cash receipts and disbursements basis and his returns for 1922 and subsequent years were made on that basis (R. 119).

Shortly after the filing of Ryan's return for 1924 and on April 15, 1925, Carey wrote the defendant as Collector a letter in which he pointed out that the bonuses from the sale of the three oil and gas leases had been reported

on the return as capital net gain from the sale of assets held for more than two years and requested that the return be reviewed at the earliest possible date and a specific ruling made on the question of its correctness in that respect (R. 64, 153). On April 21, 1925, an amended return was made for the taxpayer after an examination into his tax liability, by Harry A. Sproles, a deputy collector in the office of the defendant, in which he set up the oil and gas lease bonuses as ordinary income and also made other revisions of the original return not material here, and determined a deficiency in Ryan's tax of $47,623.49. On this return no deduction for depletion on the lease bonuses was allowed (R. 65, 150-152). Ryan refused to sign this return, and protested the additional tax (R. 66).

Included by inadvertence and mistake in the $200,000 of the oil lease bonuses on Ryan's original return was the entire $40,000 in-oil payment provided for as lease bonus, notwithstanding only $8,381.69 of that payment was actually received in 1924 (R. 101, 103), leaving $31,608.31 of the $40,000 received in 1925 and erroneously included in income in 1924.

Also included by inadvertence and mistake in the $43,254.33 of oil royalties reported on Ryan's original return were certain payments totalling $16,119.22 for royalty oil produced in December, 1924, but not received until in January, 1925 (R. 90-91, 105-106).

In April, 1925, while deputy collector Sproles was engaged in preparing the amended return referred to, Carey told him that payments for certain oil runs of De-

cember, 1924, which were included in income on the taxpayer's return for 1924, were not actually received until in January, 1925 (R. 111, 117). This was Carey's testimony and Sproles, testifying for the defendant, did not deny it, but merely said he did not recall such a statement from Carey (R. 142, 144). Sproles made no change on the amended return in the income from lease bonuses and royalties shown on the original return filed by the taxpayer (R. 68, 150-152). He testified that before he made the amended return he *"had already made an examination of the Hughes County records, and had information in regard to these leases and royalty items"* (R. 144).

Again in the early part of 1928 when Revenue Agent V. V. Hardcastle was investigating Ryan's return and income tax liability for 1925, Carey called that examining officer's attention to the fact that payments for certain oil runs for December, 1924, were included in income on the taxpayer's return for that year, though not actually received until in 1925 (R. 117). The defendant did not call Hardcastle as a witness.

After various conferences between Carey, representing the taxpayer, and conferees representing the Bureau of Internal Revenue (R. 66), and the preparation and filing by Carey for the taxpayer of a depletion report based on discovery values claimed on Ryan's property after production was actually brought in on that property, such depletion report being termed a Form O (R. 215-217), the Commissioner sent a notice of deficiency under the provisions of Section 274 of the Revenue Act of 1926, advising

the taxpayer of the determination of a deficiency in his income tax for 1924 of $36,743.62, as well as a deficiency for each of the years 1925 and 1926, and further advising him of his right to petition the Board of Tax Appeals within sixty days from the date of that letter for the redetermination of his tax liability (R. 153-160). This notice of deficiency was dated December 26, 1928, and was sent by registered mail addressed to Mr. Thomas Ryan, c/o Tom F. Carey, Braniff Building, Oklahoma City, Oklahoma. For some reason not disclosed, the letter was returned undelivered. The Commissioner thereupon sent the letter to the defendant as Collector of Internal Revenue at Oklahoma City, Oklahoma, with directions to make delivery of it, and on January 15, 1929, the defendant re-mailed the letter by registered mail addressed to Mr. Thomas Ryan, c/o Tom F. Carey, 709 Braniff Building, Oklahoma City, Oklahoma, and on January 16, 1929, it was received by Carey (R. 69-70).

Thereafter Ryan filed his petition with the Board of Tax Appeals for a review of the determination of the deficiency for 1924 as set forth in the Commissioner's deficiency letter. The deficiencies as therein set forth for the years 1925 and 1926 were paid. Ryan's petition for review was received and filed with the Board under Docket No. 43126 on March 11, 1929 (R. 160). In due time the Commissioner filed his answer in the case, and thereafter Ryan filed an amended petition and the Commissioner filed his answer to the amended petition (R. 70-71).

The issues in the case having been duly made up, it was

assigned for trial at a field session of the Board held in Oklahoma City, Oklahoma, in September, 1932. When called for trial *the Commissioner moved to dismiss the proceeding for want of jurisdiction in the Board* on the ground that the notice of deficiency was dated December 26, 1928, and the petition for review was not filed with the Board until March 11, 1929, and hence was not filed within sixty days of the time of the mailing of the notice as required by law. Evidence was heard on this motion and the petitioner by his attorney confessed it. Thereupon on September 26, 1932, the Board sustained and granted the motion and dismissed the proceeding and the petitioner's petition for review for lack of jurisdiction (R. 160-161).

After Ryan's petition for review had been filed with the Board and the above proceeding instituted thereby, and while it was pending and shortly prior to October 2, 1929, Carey, as agent and representative of the taxpayer, had various conversations with P. G. Rawdon, assistant to the Collector and executive head of the Collector's office, in respect to the payment of the proposed deficiency to the Collector to be held in an unidentified fund account, but without any assessment of such deficiency, pending the determination of the case before the Board of Tax Appeals, and thereby stopping and avoiding the accumulation of interest on the amount of the deficiency at the rate of 6% per annum in event it should be finally determined that the taxpayer was liable for that amount in tax. Rawdon advised Carey that he could make the payment of the amount without an assessment thereof and that the money so paid would be placed in the Collector's unidentified fund account and re-

main there without assessment until a final determination of the proceeding before the Board of Tax Appeals and then would be applied in satisfaction of any tax liability that might be determined and assessed against the taxpayer, and that such payment would stop the accumulation of interest on the amount so paid, and that if no tax liability was determined against the taxpayer, such sum so deposited would be refunded to him (R. 72-73, 77-78).

Following such conversations and on October 2, 1929, Carey deposited for the taxpayer with the defendant herein as Collector $36,500 (R. 72, 161) to be held by him in his unidentified fund account until the case in the Board of Tax Appeals was disposed of, and then applied against additional tax for 1924, if any was adjudged (R. 161).

Thereafter on November 23, 1929, the Commissioner assessed against the taxpayer $43,635.73 additional tax and interest for 1924 (R. 96).

On November 29, 1929, the defendant as Collector issued to the taxpayer a notice that the above amount of tax and interest had been assessed against him and a demand for the payment of $9,135.73 under penalty of interest thereon after ten days at the rate of 1% per month and of collection with costs by seizure and sale of property (R. 73, 162-163).

On December 9, 1929, Carey wrote the Commissioner a letter protesting against the assessment of the tax and interest (R. 73-74). After referring to the case pending before the Board of Tax Appeals Carey said:

"The taxpayer in this instance has not waived and does not waive any of the provisions prohibiting assessment and collection while the case is pending for final determination before the Board of its decision therein."

And also:

"We respectfully protest the assessment of this tax as illegal and unwarranted * * * and protest also as illegal and unwarranted any procedure to collect the same until the Board's decision in this case has become final" (R. 163-164).

On December 10, 1929, the defendant as Collector issued Distraint Warrant No. 20583 against the taxpayer for the collection of $9,135.73 of the amount of tax and interest assessed on November 23, 1929. This distraint warrant was served on Carey as agent and representative of the taxpayer on December 11, 1929 (R. 74-75), and on December 12, 1929, he paid the amount called for under written protest and said:

"Protest is made on the ground that the assessment is erroneous and illegal, and payment is made under duress solely to prevent the imposition of penalties threatened and the attachment and seizure of property" (R. 165).

On December 19, 1929, the Commission replied to Carey's letter of December 9, 1929, and said that the assessment of $36,500 on November 23, 1929, was made "to clear the Collector's records," and that the assessment would not jeopardize the taxpayer's appeal to the Board, and further that:

"Since you indicate that the Collector is endeavoring to collect the full amount of the assessment in the

amount of $45,635.73, the matter is being taken up with that official" (R. 112-113).

Thereafter on April 7, 1933, Ryan filed with the Commissioner his claim for refund of the full amount of the $45,635.73 tax assessed and paid in 1929. This claim was made out on Form 843 prescribed by the Treasury Department for claims for refund and set forth all of the grounds for refund alleged in the plaintiff's petition herein as well as others (R. 75-76, 165-176).

Upon the filing of this claim an investigation of the taxpayer's income tax liability for the year 1924 was made by a revenue agent and upon that investigation, after various conferences and some correspondence with Carey representing the taxpayer, a refund of $6,065.27 of tax was allowed (R. 97-98, 183-186). Part of this tax and accrued interest was duly paid the taxpayer and part was applied as a credit against an asserted tax liability for another year (R. 187-188).

Thereupon the plaintiff brought the instant suit to recover the balance of tax and interest assessed and collected in 1929 in the sum of $38,052.36.

The parties having waived a jury trial by written stipulation filed in the case, the trial court made findings of fact and therein found specially and generally for the defendant (R. 48-53, 54), and also found for him on all the issues of law (R. 53-54), and judgment for the defendant was rendered accordingly (R. 54-55). The Circuit Court of Appeals affirmed the judgment of the trial court in all respects (R. 219-229).

II.

JURISDICTION

1. The date of the judgment of the Circuit Court of Appeals to be reviewed is March 18, 1941 (R. 229). The opinion of the Court was handed down on the same day (R. 219-229).

2. The statutory provision under which the jurisdiction of this Court is invoked and which is believed to sustain its jurisdiction is Section 347(a) of Title 28 of the United States Code, being Section 240 of the Judicial Code, as amended.

3. The decision of the court below is in conflict with the decisions of various Circuit Courts of Appeals and of this Court and decides an important question of Federal law which has not been, but should be, settled by this Court. This Court entertains jurisdiction to grant writs of certiorari in similar cases at every term, and there can be no need to list any of the great array of cases in which its jurisdiction is so exercised.

4. The petition for the writ is presented under Rule 38, paragraph 5(b), of the Revised Rules of this Court adopted February 13, 1939, and effective February 27, 1939.

III.

QUESTIONS PRESENTED

The questions presented on this petition may be stated generally as follows:

1. Is the taxpayer estopped to claim a refund of tax overpaid for 1924 as the result of the erroneous inclusion in income on his return for that year, which was made on a cash receipts and disbursements basis, of certain items of income which were not received until in 1925, on the ground that the assessment of additional tax upon such items for 1925 was barred by limitation when he filed his claim for refund?

2. Was the taxpayer entitled to have his allowance for depletion on the oil production and bonuses for leases received from his land in 1924 computed on the discovery value thereof resulting from the Hully Sands offset well, a part of the cost of which he paid in order to test and prove his land for oil and which did discover oil on his land?

3. Was the assessment and collection in 1929 of a deficiency in the taxpayer's tax for 1924 illegal and void in whole or in part because made while his appeal from the determination of such deficiency was docketed and pending before the Board of Tax Appeals and, therefore, in direct contravention of the express prohibition of the statute, or, if his appeal to the board was void, then because made after the assessment and collection of such deficiency was barred by limitation?

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The petitioner relies on the following reasons for the allowance of a writ of certiorari:

1. The Circuit Court of Appeals, in deciding that the inclusion by mistake of the taxpayer in income in 1924 of items not received until 1925 was sufficient to sustain the defense of estoppel pleaded by the defendant, notwithstanding that the taxpayer's returns for all years were made on a cash receipts and disbursements basis and his returns for 1924 and 1925 were audited by the Commissioner and additional tax assessed against him for each year and that the additional tax assessed for 1924 was based upon a return prepared by a deputy of the defendant and which the taxpayer refused to sign, has rendered a decision in conflict with the decisions of the Circuit Court of Appeals of the Second Circuit in *Helvering* v. *Brooklyn City R. Co.*, 72 Fed. (2d) 274; *Salvage* v. *Commissioner*, 76 Fed. (2d) 112, and *Commissioner* v. *Union Pac. R. Co.*, 86 Fed. (2d) 637, and with the decision of the Circuit Court of Appeals of the Fourth Circuit in *Hull* v. *Commissioner*, 87 Fed. (2d) 260, and with the decision of the Circuit Court of Appeals of the Eighth Circuit in *Crossett Lumber Co.* v. *United States*, 87 Fed. (2d) 930, and with the decision of the Circuit Court of Appeals of the Ninth Circuit in *Van Antwerp* v. *United States*, 92 Fed. (2d) 871, and with the decision of the Court of Appeals of the District of Columbia in *Louis Werner Saw Mill Co.* v. *Helvering*, 96 Fed. (2d) 539, and with the deci-

sions of this Court in *Helvering* v. *Salvage*, 297 U. S. 106, and *McEachern* v. *Rose*, 302 U. S. 56, upon the same matter.

2. The Circuit Court of Appeals, in deciding that the taxpayer, notwithstanding he contributed to the cost of drilling an offset well to his land for the purpose of discovering oil on it and proving it for oil production and by such well did discover oil on it and prove it for oil production, was not entitled to have his allowance for depletion upon his oil income from his land in 1924 computed on the basis of its value resulting from the discovery of oil thereon through such offset well, has rendered a decision in conflict with Sections 214(a) (9) and 204(c) of the Revenue Act of 1924, being the Act applicable to the year here involved, and Articles 201 to 228 of Regulations 65, being the Treasury Regulations promulgated under the Rev. Act of 1924, and Treasury Decision 3938, Cumulative Bulletin V-2 117; General Counsel's Memorandum 11385, Cumulative Bulletin XIII-1 64; Income Tax Unit 2361, Cumulative Bulletin VI-1 73, and with the decision of this Court in *Herring* v. *Commissioner*, 293 U. S. 322, and, insofar as the question is not controlled by the foregoing authorities, has rendered a decision upon an important question of Federal law which has not been, but should be, settled by this Court on the precise state of facts here presented.

3. The Circuit Court of Appeals in deciding that, because the taxpayer's appeal to the Board of Tax Appeals was not filed and docketed within sixty days after the date of the first notice of deficiency mailed to him but returned undelivered and the board thereafter dismissed his petition for want of jurisdiction on the ground that the appeal was

not timely filed, such proceeding before the board was a nullity and did not have the effect to suspend the power of the Commissioner to make an assessment of tax while it was pending nor suspend the running of the statute of limitations on the assessment of tax, has rendered a decision in direct conflict with the statutory provisions of Section 274 of the Revenue Act of 1924, Section 274(a) of the Revenue Act of 1926, and Sections 272(a) and 504 of the Revenue Act of 1928, and with the decision of the Circuit Court of Appeals for the Second Circuit in *American Equitable Assurance Co.* v. *Helvering*, 68 Fed. (2d) 46, and with the decisions of the United States Board of Tax Appeals in *USL Battery Corp.*, 32 B. T. A. 810, 812; *Puget Sound National Bank of Tacoma*, 36 B. T. A. 386, 390, and *Marie Minor Sanborn*, 39 B. T. A. 721, 725.

4. The Circuit Court of Appeals, in deciding that the assessment of a deficiency in tax for 1924 by the Commissioner in November, 1929, while an appeal by the taxpayer from the determination of such deficiency was docketed and pending before the Board of Tax Appeals was not illegal and void, but merely premature and irregular, has rendered a decision in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *American Equitable Insurance Co.* v. *Helvering*, 68 Fed. (2d) 46, and with the decision of the Circuit Court of Appeals for the Seventh Circuit in *United States* v. *Yellow Cab Co.*, 90 Fed. (2d) 699, and with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Ventura Consolidated Oil Fields* v. *Rogan*, 86 Fed. (2d) 149, and with the decisions of the District Court of the United States for the District of Maryland

in *United States* v. *Barber*, 24 Fed. Supp. 229, and *United States* v. *Barber*, 25 Fed. Supp. 197, and with the decisions of this Court in *Bowers* v. *New York and Albany Lighterage Co.*, 273 U. S. 346, and *United States* v. *Continental National Bank & Trust Co.*, 305 U. S. 398.

5. The Circuit Court of Appeals, in deciding that the docketing by the taxpayer of a proceeding before the United States Board of Tax Appeals with respect to the proposed deficiency in tax for 1924, which was later dismissed by the board for lack of jurisdiction, was a nullity and did not have the effect to suspend the power of the Commissioner to assess the deficiency while such proceeding was pending nor to suspend the running of the statute of limitations, and that the assessment of the deficiency by the Commissioner in November, 1929, was valid and the tax paid on such assessment could not be recovered, notwithstanding such assessment was barred by limitation when made, has rendered a decision in conflict with Section 607 of the Revenue Act of 1928, and with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Welch* v. *Schweitzer*, 106 Fed. (2d) 885, and with the decisions of this Court in *McEachern* v. *Rose*, 302 U. S. 56, and *United States* v. *Continental National Bank & Trust Co.*, 305 U. S. 398.

6. The question whether Sections 272(a) and 504 of the Revenue Act of 1928 and similar provisions in all subsequent Revenue Acts are mandatory or whether, notwithstanding such statutory provisions, the Commissioner may assess and collect a deficiency in tax after a proceeding in respect of such deficiency has been placed on the docket of

the Board of Tax Appeals and while there pending undetermined and such assessment and collection of tax be deemed not void, but merely irregular and at most premature, in event it is eventually ruled that the taxpayer owed the tax, is an important question of federal law which has not been, but should be, settled by this Court.

Wherefore, your petitioner prays that a writ of certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Tenth Circuit at Denver, Colorado, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in case No. 2192 in said Court entitled *May Ryan, Executrix of the Will and Estate of Thomas Ryan, Deceased, Appellant*, v. *Acel C. Alexander, Formerly Collector of Internal Revenue, Appellee*, to the end that said cause may be reviewed and determined by this Court as provided by the statutes of the United States and that the judgment of said United States Circuit Court of Appeals in said case be reversed by this Court, and that petitioner have such further relief as to this Court may seem proper.

Dated at Oklahoma City, Oklahoma, this 9th day of June, 1941.

MAY RYAN,
Executrix of the Will and Estate, of Thomas Ryan, Deceased, Petitioner,

By CHAS. H. GARNETT,
608 Hales Building, Oklahoma City, Oklahoma,

Attorney for Petitioner.